IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AARON ROME, *Plaintiff*	§	
v.	§	
HCC LIFE INSURANCE COMPANY, *Defendant*	§	**CIVIL ACTION NO. 3:16-cv-02480-N**

PLAINTIFF'S BRIEF IN SUPPORT OF PLAINTIFF AARON ROME'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE DAVID C. GODBEY:

COMES NOW, Plaintiff Aaron Rome ("Rome") and files this *Plaintiff's Brief in Support of Plaintiff Aaron Rome's Response to Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and Brief in Support* and would show unto the Honorable Court the following:

I.
INTRODUCTION

Defendant HCC Life Insurance Company ("HCC") asks this Court to either dismiss Rome's state law claims or grant it summary judgment on same based on ERISA preemption. While HCC presents a basic primer on ERISA, it wholly fails to set out applicable law and summary judgment evidence to entitle it to any relief.

Defendant's Motion to Dismiss Or, In the Alternative, Motion for Summary Judgment and Brief in Support ("Motion") should be denied.

II.
SUMMARY JUDGMENT FACTS

1. The particular insurance policy at issue, or one similar to it, have not been addressed by any reported case, whether published or unpublished, with regard to ERISA applicability;

2. Documents which are a part of HCC's summary judgment appendix create a contradictory and confusing picture of the HCC insurance policy and any so-called plan. For example: "The National Hockey League Players' Health and Benefits Fund (the "Fund") was established January 1, 2006 to serve as a funding medium for certain benefits that are self-insured by National Hockey League Players' Association member clubs (the "Sponsor"), and provided under the National Hockey League Players' Health Fund." *Motion, Appendix to Defendant HCC Life Insurance Company's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and Brief in Support ("Def. App."),* 370 ¶1 (first para.). Notably the HCC Policy is not self-insurance and the HCC summary judgment attachments demonstrate there is no self-insurance;

3. By HCC's own admission, no employer, employee organization, or both control the day-to-day operation and/or administration of the HCC policy, much less any so-called "Plan." *Cooney Declaration, Def. App.* 2;

4. HCC has not supplied any admissible summary judgment evidence, documentary or otherwise, that HCC is a plan administrator or plays some role under ERISA;

5. HCC's conduct is inconsistent with claims of ERISA applicability. For example, HCC refused to provide its claim file documents including the basis for any claims decision: "We are acknowledging your written request for the medical records report, as we acknowledged your verbal request during our telephone call; however, as I had stated during our call, we will not be providing you a copy of the entire report as it is our own work product, but we will disclose the doctor's findings/the results of the review." *See Affidavit of John E. Collins ("Collins Affidavit")*, with attached Exhibit A-3, attached as *Plaintiff's Appendix in Support of Plaintiff Aaron Rome's Response to Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and Brief in Support ("Rome App.")* 1-8 and 56-58. Such materials must be provided if ERISA applies;

6. The existence of a so-called plan is not supported by HCC's summary judgment attachments. For instance, and not by way of limitation, the materials attached to the *Motion* do not establish the claims review process, particularly any appeal process. Moreover, the source of funding cannot be easily ascertained by a reasonable person. The summary judgment attachments do not substantiate the source of funding except for a conclusory declaration not supported by any document or other tangible source;

7. When Rome's counsel directed specific inquiries related to any assertion of ERISA applicability, he was met with either no response, a nonresponsive reply, or

sent documents which did not answer the questions posed. By way of example and not by way of limitation, Rome's counsel was not provided materials documenting or setting out any appeal process or timely provided materials related to Rome's claim. *Collins Affidavit, Rome App.* 1-8, 56-71;

8. In its *Motion*, HCC asserts the NHL Clubs are responsible for all premiums (assumably insurance premiums) while the Declaration of Craig Harnett contradicts this assertion by noting the NHL Clubs pay a part of the premiums, but not disclosing who contributes the remainder. *See Motion, Def. App.* 68;

9. HCC wholly fails to establish any employer-employee relationship, the existence of an employee organization, or both with respect to the establishment and/or maintenance of any Plan; and

10. HCC makes claims decisions and HCC is an insurance company engaged in the business of insurance, an entrepreneurial venture. *Cooney Declaration, Def. App.* 2

III.
STANDARDS FOR MOTION TO DISMISS AND SUMMARY JUDGMENT

A. STANDARDS FOR A MOTION TO DISMISS

When faced with a Rule 12(b)(6) motion to dismiss, the Court must determine whether the plaintiff has asserted a legally sufficient claim for relief. *See e.g., Biliouris v. Sundancve Resources, Inc.* 559 F.Supp.2d 733, 735 (N.D. Tex. 2008 (Godbey, J.) (citing *Blackburn v. City of Marshall,* 42 F.3d 925, 931 (5th Cir. 1995)). A viable complaint must include "enough facts to state a claim to relief that is plausible on its face," i.e., "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim

or element]." *Biliouris,* 559 F.Supp.2d at 735 (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1965, 1974, 167 L.Ed.2d 929 (2007)). A plaintiff is required to provide "more than labels and conclusions, and a formulaic recitation of a cause of action will not do." *Biliouris,* 559 F.Supp.2d at 735 (citing *Twombly,* 127 S.Ct. at 1965). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Biliouris,* 559 F.Supp.2d at 735-36 (citing *Twombly,* 127 S.Ct. at 1965) (citations omitted). In ruling on a Rule 12(b)(6) motion, the court must limit its review to the face of the pleadings, accepting as true all well-pleaded facts and viewing them in the light most favorable to the plaintiff. *Biliouris,* 559 F.Supp.2d at 736 (citing *Spivey v. Robertson,* 197 F.3d 772, 774 (5th Cir. 1999)).

B. STANDARDS FOR A MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) provides that a party moving for summary judgment has the burden of demonstrating that no genuine issue of fact exists and that it is entitled to judgment as a matter of law. *Standard Waste Systems, Ltd. v. Mid-Continent Casualty Co.,* 2009 WL 10678558, at *2 (N.D. Tex. Sept. 1, 2009) (Godbey, J.) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986) and *Harbor Ins. Co. v. Trammel Crow Co.,* 854 F.2d 94, 98 (5th Cir. 1988)). The Court is to accept the nonmoving party's evidence and draw all justifiable inferences in its favor when resolving factual controversies. *Standard Waste Systems, Ltd.,* 2009 WL 10678558, at *2 (citing *Anderson,* 477 U.S. at 255 and *Olabisiomotosho v. City of Houston,* 185 F.3d 521, 525 (5th Cir. 1999)). The Court must determine whether "the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Standard Waste Systems, Ltd.*, 2009 WL 10678558, at *2 (citing Fed. R. Civ. P. 56(c)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) and *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc)). Conclusory allegations unsupported by specific evidence "are insufficient to either support or defeat a motion for summary judgment." *Standard Waste Systems, Ltd.*, 2009 WL 10678558, at *2 (citing *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1220 (5th Cir. 1985)).

IV.
OBJECTIONS TO HCC'S SUMMARY JUDGMENT APPENDIX

HCC relies on an appendix to its *Motion* for summary judgment purposes, assumably believing those materials are admissible summary judgment evidence. However, a motion for summary judgment depends on admissible summary judgment evidence. *Fed. R. Civ. P.* 56(c); *Lujan v. Nat'l Wildlife Fed'n*, 493 U.S. 871, 888, 110 S.Ct. 3177, 3188, 81 L.Ed.2d 718 (1990). Because HCC's appendix is not admissible summary judgment evidence, the documents identified as objectionable should not be considered and Rome's objections thereto should be sustained.

Rome objects to the following attachments in HCC's Appendix submitted by HCC in support of its *Motion*:

1. The "declaration" of Kathleen Cooney - *Def. App.* 1-5 - is objectionable as it is conclusory, does not demonstrate how she has personal knowledge of the "facts" recited therein, is without necessary foundation, and does not establish how she is

competent to testify on the matters stated therein. *Fed. R. Civ. P.* 56(c)(4) (an affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated); *see e.g., TIG Ins. Co. v. Sedgwick James,* 276 F.3d 754, 759 (5th Cir. 2002) (stating that conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial); *Hicks v. Brysch,* 989 F.Supp. 797, 810-11 (W.D. Tex. 1997) (unsubstantiated assertions are not competent summary judgment evidence). Unsupported affidavits setting forth ultimate or conclusory facts and conclusions of law are insufficient to either support or defeat a motion for summary judgment. *Stagliano v. Cincinnati Ins. Co.,* 633 Fed. Appx. 217, 220 (5th Cir. Dec. 11, 2015) (citing *Orthopedic & Sports Injury Clinic v. Wang Lab., Inc.,* 922 F.2d 220, 225 (5th Cir. 1991) and *Galindo v. Precision Am. Corp.,* 754 F.2d 1212, 1216 (5th Cir.1985)); *see also Shaboon v. Duncan,* 252 F.3d 722, 736 (5th Cir.2001). Ultimate or conclusory facts and conclusions of law cannot be utilized on a summary judgment motion. *See e.g., Cephus v. Texas Health and Human Services Commission,* 146 F.Supp.3d 818, 836 (S.D. Tex. 2015).

In particular, Rome objects to paragraphs 7-12 of the Cooney Declaration. Cooney does not attribute her assertions in these various paragraphs to any particular source. *Def. App.* 2-4. The attachments (letters, etc.) referenced therein which speak to ERISA, an ERISA plan, ERISA procedures and appeal procedures are nothing more than conclusions, unsupported by any foundation or competence of the witness and

constitute inadmissible hearsay. First, there is no foundation that establishes Cooney or Daniel Libby (the writer of the several letters and/or emails) knows, appreciates, understands or is competent to testify as to what ERISA is or what is an ERISA plan, as well as related matters addressing why these terms would apply to this lawsuit or the statements made in the letters, emails, etc. Neither Cooney nor Libby establish that they know what an ERISA plan is, what an ERISA plan does, how ERISA applies to the HCC policy or otherwise. Second, Cooney's statements and/or the reference to ERISA, any plan and/or claims procedures in the attachments is without foundation, is hearsay, conclusory, and without competence. Third, Cooney's statements are not supported by any reference to any documents that could substantiate a foundation, personal knowledge, or overcome hearsay prohibitions. In summary, Cooney asserts a number of conclusions either directly or through communications by others which are without foundation, are conclusory, hearsay, and/or incompetent. The objections to these paragraphs (7-12) include any communications referenced therein and do not qualify as admissible summary judgment evidence.

Paragraph 14 of the Cooney Declaration is objectionable because it is blatantly false, Rome did supply materials in support of his appeal.

Finally, Cooney attempts to prove up an alleged HCC insurance policy, yet certain pages of the attachment do not appear to be part of the policy. *See* exhibits to Cooney Declaration, *Def. App.* 30, 32, 34 and 39-40 (documents titled "Unsigned NHL Free Agents"). Cooney does not explain how or why these pages are actual parts of the insurance policy at issue or how she has personal knowledge of what the insurance

policy includes, with all riders, exclusions, definitions, etc. Importantly, the "policy" attached to the Cooney declaration is not the same as the policy provided to Rome's counsel. *See Collins Affidavit*, Exhibits A-1 and A-2 attached thereto, *Rome App.* 1-55. Cooney does not attempt to explain these inconsistencies.

For all these reasons, the Cooney Declaration is objectionable, not admissible summary judgment evidence and should be stricken.

2. The Declaration of Craig Harnett - *Def. App.* 67-70 - suffers from numerous evidentiary defects similar to the Cooney Declaration. The Harnett Declaration is objectionable because it is conclusory, does not demonstrate how he has personal knowledge of the "facts" recited, asserts conclusions of law, and does not show how he is competent to testify on the matters stated in his declaration. *See e.g., TIG Ins. Co.,* 276 F.3d at 759; *Hicks,* 989 F.Supp. at 810-11; *Fed. R. Civ. P.* 56(c)(4); *Stagliano,* 633 Fed. Appx. at 220; *Orthopedic & Sports Injury Clinic,* 922 F.2d at 225; *Galindo,* 754 F.2d at 1216; *Shaboon,* 252 F.3d at 736; *Cephus,* 146 F.Supp.3d at 836 (ultimate or conclusory facts and conclusions of law cannot be utilized on a summary judgment motion). Harnett does not disclose how he has acquired personal knowledge and what documents (if any) he reviewed and/or relied on to gain such knowledge. *Def. App.* 67-70. Rather, Harnett announces conclusions without factual support.

Initially, the two "policies" attached to Defendant's Appendix (one attached to the Cooney Declaration and one attached to the Harnett Declaration) are inconsistent. *See Def. App.* 185 and 187 (these pages missing from the Cooney Declaration but attached to the Harnett Declaration). As a result, this "evidence" is materially and

fatally irreconcilable, self-disproving and objectionable.

Second, Rome objects to paragraphs 3-5 and 7-11 of the Harnett Declaration for reasons of hearsay, lack of foundation, and no competence. *See Def. App.* 68-70. Paragraph 3 deals with the composition of the NHL including describing it as "an unincorporated association, organized as a joint venture to operate a league of 30 member clubs located in diverse cities throughout the United States and Canada." *Def. App.* 68. There is nothing to verify that Harnett knows what is "an unincorporated association" or "joint venture" - both being legal terms. The reference to "diverse" in paragraph 3 is also objectionable because this term is vague and undefined. Harnett's statements in this paragraph are legal conclusions and objectionable. *See e.g., Stagliano,* 633 Fed. Appx. at 220 (unsupported affidavits setting forth conclusions of law are insufficient to support a motion for summary judgment; *Orthopedic & Sports Injury Clinic,* 922 F.2d at 225; *Galindo,* 754 F.2d at 1216; *see also Shaboon,* 252 F.3d at 736; *Cephus,* 146 F.Supp.3d at 836 (ultimate conclusions of law cannot be utilized on a summary judgment motion).

Paragraph 4 is likewise objectionable because it is without foundation. Harnett does not reference a source of information about how the NHL Players' Health and Benefits fund was formed, why it was formed and its purpose. *Def. App.* 68. Harnett just declares this conclusory statement without assigning any source, basis of knowledge, or how it can be verified.

Paragraph 5 is objectionable for the same reasons as Paragraph 4.

Paragraph 7 is *prima facially* objectionable because it includes a legal conclusion

by pronouncing the HCC policy is an employee welfare benefit plan ("EWBP"). A naked statement that the HCC policy is an employee welfare benefit plan is a legal conclusion. Harnett does not provide a foundation demonstrating he even knows what an employee welfare benefit plan, is much less the basis for asserting the HCC policy is an EWBP.

Rome objects to Paragraph 8 as it is without foundation. Harnett provides no source for this declaration.

Paragraph 9 is objectionable because there is no demonstration of personal knowledge or foundation about any filing, how he knows such a filing was made, why the filing was made or even required or merely a pretext and/or whether it was necessary to make such a filing. Additionally, Harnett's attempt to create any inference that such a filing means ERISA is involved is merely a back-door effort to bootstrap ERISA applicability. Harnett cannot avoid providing a foundation by using a document, the basis of which Harnett cannot legally address or explain.

Paragraph 10 is objectionable because there is no foundation or competence to show how Harnett knew anything about Rome, especially since the document he refers to is unsigned and does not create any nexus between the letter and the Board. Furthermore, any reference to "relevant provisions of the CBA" is unsubstantiated, without foundation, and rank speculation. Harnett offers nothing to demonstrate why any particular parts of any CBA would be relevant.

Paragraph 11 is objectionable because this paragraph refers to inadmissible hearsay in a communication and the content of the communication is without

foundation, incompetent, conclusory and hearsay. Having Harnett quote a part of the communication does not qualify it as admissible evidence and does not make the communication admissible - particularly where the communication asserts legal and factual conclusions without foundation. Referencing "a fund" and attempting to implicate ERISA without substantiating ERISA applies, among other things, is just one example of why Paragraph 11 is inadmissible.

For all these reasons, the Harnett Declaration is objectionable, not admissible summary judgment evidence and should be stricken.

For the foregoing reasons, Rome respectfully requests his objections to HCC's summary judgment attachments as identified herein be sustained and stricken.

V.
ARGUMENTS AND AUTHORITIES

A. THE LAW

Whether an insurance policy is governed by ERISA is a question of fact. *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449, 1451 (5th Cir. 1991). ERISA is limited to employee welfare benefit plans ("EWBP") that are established or maintained by an employer, employee organization, or both for the purpose of providing certain types of benefits to its employees. 29 U.S.C. § 1002(1); *MDPhysicians & Assoc., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 182 (5th Cir. 1992) *cert. denied*, 506 U.S. 861, 113 S.Ct. 179, 121 L.Ed.2d 125 (1992); and *Int'l Ass'n. of Entrepreneurs of America Ben. Trust v. Foster*, 883 F.Supp. 1050, 1056 (E.D. Va. 1995).

Deciding ERISA's application to an insurance policy turns on whether an EWBP is maintained or established by an employer, an employee organization and/or both. 29 U.S.C. § 1003(a); *MDPhysicians*, 957 F.2d at 182. There must be an employer/employee relationship or in the case of a multiple employer welfare benefit arrangement (acronym "MEWA"), several employers and employees. *Meredith v. Time Ins.* Co., 980 F.2d 351, 354 (5th Cir. 1993); *State of Texas v. Alliance Employee Leasing Corp.*, 797 F.Supp. 542, 545 (N.D Tex. 1992); and *Longoria v. Cearley*, 796 F.Supp. 997, 1002-1006 (W.D. Tex. 1992). Alternatively, an employee organization can establish or maintain a plan. *Meredith*, 980 F.2d at 354. An employee organization for ERISA purposes under Section 1002(1) is one in which "employees" participate and the organization exists for the purpose – either in whole or in part – for "dealing with employers concerning an employee benefit plan, or other matters incidental to employment." *Bell v. Employee Security Benefit Assoc.*, 437 F.Supp. 382, 394 (D. Kansas 1977). The term "both" in Section 1002(5) refers to an employee organization and employer (or in the case of a MEWA – multiple employers). *MDPhysicians*, 957 F.2d at 182; *State of Texas v. Alliance Employee Leasing*, 797 F.Supp. at 545.

Whether an employer has established or maintained an EWBP is determined by the employer's involvement with the establishment and administration of the purported plan. *Kerans v. Provident Life and Acc. Ins. Co.*, 452 F.Supp.2d 665, 673 (N.D. Tex. 2005). To determine whether an employer has established or maintained an ERISA plan, the focus is on the employer and its involvement with a plan. *Longoria*, 796 F. Supp. at 1005 (relying on *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 978 (5th Cir. 1991).

ERISA does not apply to the purchase of insurance "where the employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits." *Kearns*, 451 F.Supp.2d at 674. An employer under ERISA includes any person acting directly as employer or "indirectly in the interests of an employer, in relation to an employee benefit plan" which includes "a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5); *see also MDPhysicians*, 957 F.2d at 182-83.

A multiple "employee welfare arrangement" under ERISA, referred to by the acronym "MEWA", refers to "all arrangements 'established or maintained for the purpose of offering or providing' certain benefits 'to the employees of two or more employers . . . or to their beneficiaries.'" *MDPhysicians*, 957 F.2d at 181 (citing in part 29 U.S.C. § 1002(40)(A)). ERISA does not govern all MEWAs. *MDPhysicians*, 957 F.2d at 181. A MEWA is broader than an EWBP. *Id.* To be an ERISA controlled MEWA, the proponent must demonstrate it is either a direct employer or someone or entity that acts indirectly in the interests of an employer, including a group of employers. *Id.* at 183 (relying on 29 U.S.C. § 1002(5)). A MEWA does not fall under ERISA where employers have no direct involvement into a plan's day-to-day operation or administration. *Taggart Corp. v. Life and Health Benefit Admin, Inc.*, 617 F.2d 1208, 1210 (5th Cir. 1980), *cert. denied* 450 U.S. 1030, 101 S.Ct. 1739, 68 L. Ed.2d 225 (1981); *Plog v. Colorado Ass'n of Soil Conversation Dists.*, 841 F.Supp. 350, 353 (D. Colo. 1993).

With regard to preemption, ERISA does not preempt a MEWA fully insured arrangement. *State of Texas v. National Council of Allied Employees*, 791 F.Supp. 1154 (W.D.

Tex. 1992); 29 U.S.C. § 1003(b)(3). There is no preemption where the employer has no involvement in the day-to-day operations or administration of any policy or plan. *Plog*, 841 F.Supp. at 353.

B. APPLICATION OF LAW TO THE FACTS

HCC's *Motion* can best be described as superficial, not addressing the applicable law, the actual facts, and the application of both to Rome's claims. While HCC discusses some basic ERISA principles, it does not address, much less establish, the material circumstances and facts at issue and whether ERISA applies - more specifically, whether it governs Rome's claims. For instance, HCC does not establish the necessary existence of an EWBP under 29 U.S.C. 1002(1). HCC has wholly failed to demonstrate a plan was established or maintained by an employer, an employee organization, or both. While HCC throws acronyms around such as the NHL and NHLPA, it does not establish just what these entities are, their purpose, and how they might apply to the rubric of ERISA, particularly in terms of employer, employee organization or both. HCC does not mention much less discuss the term of "Multiple Employer Welfare Arrangement" ("MEWA"). The totality of HCC's summary judgment argument is dependent on supposition, hopeful assumptions, and stark conclusions which can be summarized as: "it is ERISA because HCC says it is" or in the words of HCC: "indeed, this case involved a quintessential ERISA Plan." *Motion*, at p. 7. If this case actually involved a

"quintessential ERISA Plan" then HCC ought to be able to prove it.[1] But, HCC has remarkably failed in its burden of proof.

In order to prevail on its *Motion*, HCC must prove its policy is governed by ERISA and Rome's state law claims are completely preempted. *Davis v. Reliance Standard Ins. Co.*, 2004 WL 1619958, *2 (N.D. Tex. July 19, 2003). ERISA preemption is an affirmative defense and the defendant owns the burden to prove same. *Dueringer v. General American Life Ins. Co.*, 42 F.2d 17, 130 (5th Cir. 1988); *Davis*, 2004 WL 1619958, *2. HCC must show that its policy is part of an "employee welfare benefit plan" (EWBP) defined in 29 U.S.C. § 1002(1). *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 240 (5th Cir. 1990); *MDPhysicians*, 957 F.2d at 183. HCC has failed to meet this most basic requirement.

According to HCC's Statement of Facts, it avers a "plan" is established and maintained by the NHL and NHLPA and includes disability coverage. *Motion*, at p. 3. ¶ 6. But HCC does not prove, present evidence, argue, or assert that the NHL, NHLPA, or any other person or entity was an employer, employee organization, or both that established or maintained any plan. The absence of summary judgment evidence on the existence of an employee welfare benefit plan is outcome determinative to any claim of ERISA applicability and/or preemption. *MDPysicians*, 957 F.2d at 185; *Hansen*, 940 F.2d at 977-78, *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (5th Cir. 1982); *State of Texas v. Alliance Employee Leasing*, 797 F.Supp. at 545; *Longoria*, 796 F.Supp. at 1005-1006; and

[1] Rome anticipates that HCC will attempt to hit the reset button on its *Motion* through its reply, because of HCC's objective failure to address facts and law essential to the relief requested in the *Motion*. HCC is not entitled to raise and include new evidence and arguments in a reply which should have been addressed in the initial motion and necessarily encompasses the movant's burden of proof.

State of Texas v. National Council of Allied Employees, 791 F.Supp. 1154, 1161 (W.D. Tex. 1992).

Not only does HCC fail to establish an employer, an employee organization, or both established or maintained an EWBP, it simply ignores its burden to do so. HCC does not confront the issue of MEWA, much less discuss this term. And even if HCC had mentioned a MEWA, it would not prove ERISA application, much less preemption. *MDPhysicians*, 957 F.2d at 181 (holding the mere existence of a MEWA does not translate into ERISA preemption). Where employers have no direct control, or are not involved in a plan's day-to-day operations or administration, there is no ERISA preemption. *Taggart Corp.*, 617 F.2d at 1210; *Plog*, 841 F. Supp. at 353. Even the existence of a MEWA would not help HCC, as not all MEWAs establish ERISA preemption. *MDPhysicians*, 957 F.2d at 178.

Also, conspicuously absent is any evidence substantiating either an employer, MEWA, employer organization, or both are involved in the day-to-day operation or carrying out of any plan, and more specifically, the HCC policy. The Harnett Declaration is noticeably silent on this critical evidence. The Cooney Declaration reveals no such involvement – but the opposite where she notes neither the NHL, NHLPA, the Board and the Fund play any role in the HCC policy and claims process. Cooney Declaration, *Def. App.* 2 ¶6. No involvement of substance means no ERISA. *Taggart*, 617 F.2d at 1210; *Plog*, 841 F.Supp. at 353.

In addition to these fundamental legal deficiencies, HCC cannot prove whether a plan existed at all. To prove the existence of a plan, the proponent must demonstrate

that "a reasonable person could ascertain the intended benefits, beneficiaries, source of financing and procedures for receiving benefits." *Meredith*, 980 F.2d at 355 (relying on *Donovan*, 688 F.2d at 1373). HCC attempts to quickly dispense with proving these essential requirements through several short conclusory assertions in an effort to briskly bypass and avoid confronting this nonexistent evidence.

Here Rome was aware of the disability policy and sought to make a claim. But when Rome's claim was denied, he was given the run around. *Collins Affidavit, Rome App.* 1-8 and 56-78. When HCC was questioned about its erroneous claims denial and the materials involved in HCC's denial, it claimed that Rome was not entitled to such materials. *Collins Affidavit, Rome App.* 1-8 and 56-58. When HCC asserted Rome's claim was governed by ERISA, it failed and refused to provide materials, including evidence of the establishment of a so-called plan. *Collins Affidavit, Rome App.* 1-8 and 56-78. While some materials were provided, other questions were ignored. *Collins Affidavit, Rome App.* 1-8 and 56-78. Eventually what was sent to Rome was a confusing mess of various materials - none of which established the HCC policy was part of a plan and/or governed by ERISA and was not the same policy HCC relies on for its *Motion*. *Collins Affidavit, Rome App.* 1-8 and 9-55. Even the policy HCC attaches to its *Motion* reveals: no indication that ERISA is involved; any mention of any appeals process; any reference to any specific claims procedures; and overall nothing more than a typical insurance policy from an insurer who refuses to pay a covered claim.

Furthermore, no meaningful disclosure on the source of financing was provided. The source of premiums for the HCC policy and/or overall benefits are not disclosed.

While HCC relies on the Harnett Declaration of who pays premiums, Harnett does not reveal how this source of funding is disclosed to a reasonable person. *Harnett Declaration, Def. App.* 68. Notably, HCC claims that the NHL Clubs are "ultimately responsible for paying the premiums" - vague in the sense of premiums for what - but this statement is contradicted by Harnett's Declaration which states that it is the "Fund" which "is responsible to pay all premium payments due to the Insurer under the Policy". *See Motion*, p. 2 and *Def. App.* 68, ¶8. But, the *Motion* contradicts the Harnett Declaration where the *Motion* avers that "the NHL Clubs are ultimately responsible for paying the premiums" while Harnett declares that the "NHL Clubs contribute to the Fund for the costs of the benefits". *Motion*, p. 7; *Harnett Declaration, Def. App.* 68, ¶8. HCC's summary judgment claim that the NHL Clubs are responsible for paying premiums is directly contradicted by HCC's own purported summary judgment evidence. Given HCC's own confusion and contradictions, it can hardly claim the source of funding for benefits is clear for purposes of proving the existence of any plan.

On a more practical level, HCC does not share where Rome would learn of the source of funding. Simply because someone proclaims a source of funding does not mean a reasonable person could easily ascertain same. Likewise, claims reviewing procedures (which do not exist in the HCC policy provisions) are not disclosed. HCC does not direct this Court to where a reasonable person could locate either a source of funding or claims review procedures, including the appeals process. A reasonable person might look to the HCC policy for claims procedures, yet no review process is

provided. These critical omissions cannot make the HCC policy governed, much less preempted, by ERISA.

To the extent that HCC argues the HCC policy or something it calls a "plan" has been characterized as ERISA, this is no evidence of ERISA's applicability or the existence of an ERISA plan. Filing documents that proclaim that ERISA applies is not evidence of an EWBP or ERISA's application. HCC has attempted to characterize its policy as an ERISA-controlled benefit by invoking ERISA, or using ERISA buzz words, but these actions are not proof of an ERISA plan or an ERISA benefit. *MDPhysicians*, 957 F.2d at 181-84. Even treating an insurance policy or plan as if it is governed by ERISA does not establish that a plan is an EWBP controlled by ERISA. *Id.* at 183. Likewise, the attachments to various declarations in HCC's Appendix are not proof of an EWBP governed by ERISA because there is no proof of an ERISA plan. HCC must initially prove the elements of ERISA preemption before Rome's claims can be dismissed.

But even if the HCC policy might fall under ERISA, HCC has not met its burden of proving preemption. As previously noted, the existence of a plan does not automatically translate into ERISA preemption. *Taggart Corp. v. Life and Health Benefits Admin., Inc.*, 617 F.2d at 1210; *MDPhysicians*, 957 F.2d at 181-82; and *State of Texas v. National Council of Allied Employees*, 791 F.Supp. at 1156. The controlling statute, 29 U.S.C. § 6(A)(i), provides that a MEWA which is fully insured is not subject to complete preemption under any state law regulating insurance. State law also applies and is not preempted regarding an employee welfare benefit plan which is a MEWA and fully

insured or MEWAs that fall under Section 1003(b)(3). 29 U.S.C. § 1003(b)(3); *State of Texas v. National Council of Allied Employees*, 791 F.Supp. at 1156.

HCC's argument that Rome's state law claims are preempted must fail. HCC does not explain why there is preemption, much less acknowledge that the HCC policy is fully funded insurance which is not necessarily subject to preemption. HCC provides no analysis of why Rome's state law claims are preempted; HCC just says they are. HCC's sweeping pronouncement of preemption, relying, at best, on generic preemption principles without specifically demonstrating why Rome's state law claims would be preempted, is unavailing and cannot support dismissal or summary judgment. Indeed, HCC does not even mention sections 6(A)(i) and 1003(b)(3) dealing with preemption, much less address how these statutes do or do not apply.

HCC's *Motion* is without merit and should be denied.

VI.
CONCLUSION

HCC's *Motion* seeks to dismiss or alternatively obtain summary judgment on Rome's state law claims because of alleged ERISA preemption. But HCC has not established through admissible summary judgment evidence that an ERISA plan exists, including an employee welfare benefit plan that is established and maintained by an employer, employee organization or both where a reasonable person could ascertain intended benefits, beneficiaries, source of funding, and procedures for receiving benefits. Consequently, there is no preemption. Furthermore, HCC's *Motion* rests on

contentions contradicted by the attachments to its *Motion,* thereby self-defeating entitlement to summary judgment.

HCC's *Motion* has not met its burden of proof in seeking dismissal or summary judgment. HCC's *Motion* must be denied, and HCC should be prohibited from hitting the reset button through a reply or filing yet another motion to once again address these same issues.

VII.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Rome prays that this Honorable Court deny HCC's *Motion* and grant Rome such other and further relief to which he is entitled.

Dated: January 10, 2018.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically by operation of the Court's electronic filing system to all counsel of record on this the 10th day of January 2018.

/s/Jennifer W. Johnson
Jennifer W. Johnson